Dato' Param Cumaraswamy v MBf Capital Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-323 OF 1997
GOPAL SRI RAM, AHMAD FAIRUZ AND DENIS ONG JJCA
20 OCTOBER 1997

Civil Procedure *— Writ of summons — Setting aside — Ground: Immunity from legal process — Defamation proceedings — Whether High Court entitled as a matter of law to defer the question of the defendant's immunity until trial — Whether High Court ought to have done so on the facts of the case — Whether letter from Secretary General of the United Nation and certificate issued by Minister for Foreign Affairs provide conclusive evidence of immunity — Whether there were any serious questions that call for trial — Rules of the High Court 1980 O 12 r 7 — Convention on the Privileges and Immunities of the United Nations ss 22 — Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 art 12 — International Organizations (Privileges and Immunities) Act 1992*

Civil Procedure *— Appeal — Discretion exercised by trial judge — Interference by appellate court — Whether judicial commissioner took into account irrelevant considerations or failed to take into account relevant considerations, or asked himself wrong question, or erred in point of principle or the order made would result in injustice*

Tort *— Defamation — Action against United Nations Special Rapporteur — Defence of immunity — Whether defendant exceeded the terms of his mandate — Whether defendant spoke the alleged defamatory words in his personal capacity — Whether it is for the Secretary General of the United Nations and/or the Minister for Foreign Affairs of Malaysia to assert immunity on behalf of the defendant in respect of words uttered by him — Whether the terms of the defendant's mandate had to be construed with reference to art 12 of the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 and not s 22 of art VI of the Convention on the Privileges and Immunities of the United Nations — Rules of the High Court 1980 O 12 r 7*

The respondents ('the plaintiffs') instituted defamation proceedings against the appellant ('the defendant') in relation to an article which appeared in the International Commercial Litigation magazine under the caption 'Malaysian Justice on Trial'. The defendant took out a summons under O 12 r 7 of the Rules of the High Court 1980 ('the RHC') to set aside the plaintiffs' writ on the ground that the court had no jurisdiction over his person because he was immune from suit. The defendant's claim for immunity rested on the ground that he was, at the material time, the United Nations Special Rapporteur on the independence of judges and lawyers. In support of his claim, he relied, among other matters, on a letter written by the Secretary General of the United Nations ('the Secretary General') and a certificate issued by the Minister for Foreign Affairs of Malaysia ('the Minister') which explained the privileges and immunities granted to the defendant. The judicial commissioner held that the defendant's immunity was a matter that was not capable of resolution in a

summary manner and dismissed the defendant's summons (see [1997] 3 MLJ 300). The defendant appealed.

The defendant submitted that the judicial commissioner erred in postponing her determination of the defendant's immunity until the trial of the action. It was argued based on decided cases that there was no power in the High Court under O 12 r 7(1) of the RHC to postpone the determination of the question whether the court has jurisdiction over the person of a defendant. Alternatively, the defendant argued that even if O 12 r 7 permits a postponement of the immunity issue, the judicial commissioner was wrong in doing so because there was evidence before the judicial commissioner, which established conclusively the defendant's immunity. It was submitted that there was no serious question to be tried on the issue of the defendant's immunity. Since the Secretary General asserted immunity and the Minister had issued his certificate, there was no doubt that the plaintiffs could not implead the defendant. Further, it was for the Secretary General to decide whether the defendant had exceeded the terms of the mandate given him. The defendant referred to the relevant provisions in the Convention on the Privileges and Immunities of the United Nations ('the General Convention'), the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order') and the International Organizations (Privileges and Immunities) Act 1992 ('the Act').

The main issues before the court were whether: (i) the judicial commissioner was entitled, as a matter of law, to defer the question of the defendant's immunity; and (ii) the judicial commissioner ought to have done so on the facts of the case.

Held, dismissing the appeal:

(1) The present appeal, unlike the cases cited by the defendant, fell well outside the scope of the doctrine of sovereign immunity. The defendant in this case was not a foreign sovereign. Therefore, the immunity he claimed was not absolute and was circumscribed by the terms of the mandate conferred upon him.

Moreover, if O 12 r 7 of the RHC receives the interpretation canvassed by the defendant, it would mean that in no case would the court be in a position to say whether a Special Rapporteur had acted within the scope of his mission. It would place the rule in a strait-jacket and afford no flexibility whatsoever to its application. This would produce an unjust result as it would prohibit the court from dealing with each case according to its peculiar facts when dealing with an application under O 12 r 7.

Therefore, the judicial commissioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the defendant's immunity until after she had had the benefit of viva voce evidence

upon that issue (see pp 836G and 837B–F); *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 followed; *Juan Ysmael & Co Inc v Government of the Republic of Indonesia* [1954] 3 All ER 236 and *United States of America v Dollfus Mieg et Compagnie, SA* [1952] 1 All ER 572 distinguished. A

(2) As to the test that is to be applied in determining whether a postponement is proper in any given cases under O 12 r 7, the correct approach is to determine whether there are any serious questions that call for a trial. B

In the present case, the rival contentions between the parties regarding the issue of whether the defendant spoke and published the words complained of while on mission, ie in his capacity as a Special Rapporteur, amounted to a serious question. It would be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words. The issue under discussion was substantially an issue of fact. Like any other fact, it must be determined at trial, after hearing all the evidence led upon it and after a mature consideration of the submissions to be made on both sides. The affidavit evidence did raise a serious dispute as to the capacity in which the defendant was alleged to have spoken and published the words complained of. In the circumstances of the present case, the judicial commissioner was entirely correct in reserving her decision until after the trial of the action (see pp 838D and 840C–F). C D E

(3) The question whether the defendant exceeded the terms of his mandate is not a matter for the Secretary General to decide. It is a question that the court must determine according to the evidence presented at the trial. The opinion expressed by the Secretary General did not therefore bind the learned judicial commissioner. F

Accordingly, if the trial court finds that the defendant spoke the alleged defamatory words in his personal capacity, no question of immunity can arise. For, neither the Secretary General nor the Minister may assert immunity on behalf of the defendant in respect of words uttered by him in his capacity as advocate and solicitor. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms of his mandate. Clearly, these were matters that amount to serious questions calling for a trial of the action (see p 845D–G); *Engelke v Musmann* [1928] AC 433 distinguished. G H

Further, it appeared that the Secretary General had asserted the defendant's immunity in terms that clearly fell outside the scope of the General Convention and the 1949 Order. The Secretary General had, in his letter, taken the position that the defendant uttered the words complained of 'in the course of his mission' and was therefore immune from suit. The phrase employed by the Secretary General in his letter was of much I

wider import than that appearing in either the General Convention and the 1949 Order. For, a person may be 'in the course of his mission' and yet commit acts that are not 'in the exercise of these functions'. Therefore, the Secretary General's letter was not conclusive (see pp 845H and 846A–C).

(4) The Minister's certificate added nothing in the defendant's favour. That certificate was, as s 7(2) of the Act declares, 'evidence of the facts certified'. The Minister had not certified *as a fact* that the defendant spoke the words complained of in his capacity as Special Rapporteur. That fact was therefore still at large and must necessarily be determined by the judge at trial. The Minister's certificate only reproduced the extent of the defendant's immunity in general terms. It did not conclude the matter to the extent contended by the defendant (see p 844A–C).

(5) The terms of the defendant's mandate had to be construed with reference to art 12 of the 1949 Order and not s 22 of art VI of the General Convention because art 12 is clear and unambiguous in the provision it has made by its terms, and thus there was no necessity to have resort to s 22. The question of the independence of the defendant in the exercise of his functions as Special Rapporteur was a matter that must *ex necessitate rei* be determined with reference to the terms of his mandate. Accordingly, the question whether the defendant exceeded his mandate in the context of the immunity claimed by him under art 12 of the 1949 Order, as well as the construction of that article, were matters for the trial judge to decide. Indeed, they were serious questions to be tried (see pp 849B–D and 850B–C).

(6) The defendant had failed to demonstrate that the judicial commissioner had committed an error that warrants appellate interference. She asked herself the right questions, took into account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made had not resulted in any injustice to the defendant. There had been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts (see p 851C–D).

[Bahasa Malaysia summary

Penentang-penentang ('plaintif-plaintif') telah memulakan prosiding fitnah terhadap perayu (defendan') berkaitan dengan suatu rencana yang diterbitkan dalam majalah International Commercial Litigation di bawah tajuk 'Malaysian Justice on Trial'. Defendan telah mengambil saman di bawah A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengetepikan writ plaintif-plaintif berdasarkan alasan bahawa mahkamah tidak mempunyai bidang kuasa ke atasnya kerana beliau adalah kebal daripada guaman. Tuntutan defendan untuk

kekebalan adalah berdasarkan alasan bahawa pada masa material, beliau adalah Pelapor Khas Bangsa-Bangsa Bersatu bagi kebebasan para hakim dan peguam. Sebagai menyokong tuntutannya, beliau bergantung, antara perkara lain, kepada sepucuk surat yang ditulis oleh Ketua Setiausaha Bangsa-Bangsa Bersatu ('Ketua Setiausaha') dan perakuan yang dikeluarkan oleh Menteri Hal Ehwal Asing Malaysia ('Menteri') yang menjelaskan keistimewaan dan kekebalan yang diberikan kepada defendan. Pesuruhjaya kehakiman memutuskan bahawa kekebalan defendan merupakan suatu perkara yang tidak dapat diselesaikan secara terus dan menolak saman defendan (lihat [1997] 3 MLJ 300). Defendan merayu.

Defendan menghujahkan bahawa pesuruhjaya kehakiman terkhilaf dalam menunda keputusan beliau atas kekebalan defendan sehingga perbicaraan tindakan. Adalah dihujahkan berdasarkan kes-kes yang diputuskan bahawa tiada kuasa di Mahkamah Tinggi di bawah A 12 k 7(1) KMT untuk menunda keputusan tentang persoalan sama ada mahkamah mempunyai bidang kuasa ke atas diri defendan. Secara alternatif, defendan menghujahkan bahawa sekalipun A 12 k 7 membenarkan penundaan isu kekebalan, pesuruhjaya kehakiman adalah salah dalam berbuat demikian kerana terdapat keterangan di hadapan pesuruhjaya kehakiman, yang membuktikan kekebalan defendan secara muktamad. Adalah dihujahkan tiada persoalan serius untuk dibicarakan atas isu kekebalan defendan. Oleh kerana Ketua Setiausaha menegaskan kekebalan dan Menteri telah pun mengeluarkan perakuan beliau, tiada keraguan bahawa plaintif-plaintif tidak boleh memulakan tindakan terhadap defendan. Seterusnya, adalah untuk Ketua Setiausaha untuk memutuskan sama ada defendan telah melampaui terma mandat yang diberikan kepadanya. Defendan merujuk kepada peruntukan-peruntukan yang relevan dalam Konvensyen Keistimewaan dan Kekebalan Bangsa-Bangsa Bersatu ('Konvensyen Am'), Perintah Keistimewaan Diplomatik (Bangsa-Bangsa Bersatu dan Mahkamah Keadilan Antarabangsa) 1949 ('Perintah 1949') dan Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992 ('Akta tersebut').

Isu-isu utama di hadapan mahkamah adalah sama ada: (i) pesuruhjaya kehakiman adalah berhak, di sisi undang-undang, untuk menangguh persoalan kekebalan defendan; dan (ii) pesuruhjaya kehakiman sepatutnya telah berbuat demikian atas fakta-fakta kes.

Diputuskan, menolak rayuan:

(1) Rayuan ini, berbeza dengan kes-kes yang disebut oleh defendan, tidak dirangkumi oleh skop doktrin kekebalan pemerintah. Defendan dalam kes ini bukanlah seorang pemerintah asing. Maka, kekebalan yang dituntutnya tidak mutlak dan beliau adalah tertakluk kepada terma mandat yang dikurniakan ke atasnya.

Tambahan pula, andainya A 12 k 7 KMT menerima tafsiran yang dibentangkan oleh defendan, ia akan bermakna bahawa dalam mana-mana kes mahkamah tidak berada dalam kedudukan

untuk mengatakan sama ada seseorang Pelapor Khas telah bertindak dalam lingkungan misinya. Ia akan mengongkong kaedah ini tanpa sebarang kefleksibelan kepada pemakaiannya. Ini akan menghasilkan keputusan yang tidak adil kerana ia akan melarang mahkamah daripada menguruskan setiap kes menurut fakta-fakta khusus tersendiri ketika menguruskan suatu permohonan di bawah A 12 k 7.

Maka, pesuruhjaya kehakiman tidak wajib membuat keputusan tentang permohonan defendan secara terus. Sekiranya fakta memerlukan siasatan lanjut, di sisi undang-undang beliau berhak menangguh keputusan atas kekebalan defendan sehingga selepas manfaat keterangan viva voce mengenai isu itu boleh didapati (lihat ms 836G dan 837B–F); *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 diikut; *Juan Ysmael & Co Inc v Government of the Republic of Indonesia* [1954] 3 All ER 236 dan *United States of America v Dollfus Mieg et Compagnie, SA* [1952] 1 All ER 572 dibeza.

(2) Mengenai ujian yang harus dipakai dalam memutuskan sama ada suatu penundaan adalah betul dalam sebarang kes yang diberikan di bawah A 12 k 7, pendekatan yang betul adalah untuk memutuskan sama ada terdapat sebarang persoalan serius untuk dibicarakan.

Dalam kes ini, hujah-hujah yang bersaingan di antara pihak-pihak tentang isu-isu sama ada defendan telah melafazkan dan menerbitkan kata-kata yang diadu sewaktu menjalankan misi, dalam keupayaan beliau sebagai seorang Pelapor Khas, adalah persoalan serius. Adalah tidak selamat untuk memutuskan keupayaan dalam mana defendan melafazkan kata-kata yang dipersoalkan secara terus. Isu yang dibincangkan pada dasarnya adalah isu fakta-fakta. Seperti mana-mana fakta lain, ia mesti diputuskan di perbicaraan, selepas mendengar segala keterangan yang diutarakan dan selepas pertimbangan penuh hujah-hujah yang dibuat pada kedua belah pihak. Keterangan afidavit memang membangkitkan pertikaian yang serius mengenai keupayaan dalam mana defendan dikatakan telah melafaz dan menerbitkan kata-kata yang diadu. Dalam keadaan kes ini, pesuruhjaya kehakiman secara keseluruhan dengan betulnya menangguhkan keputusan beliau sehingga selepas perbicaraan tindakan (lihat ms 838D dan 840C–F).

(3) Persoalan sama ada defendan telah melampaui terma mandat beliau bukanlah suatu perkara untuk diputuskan oleh Ketua Setiausaha. Ia adalah persoalan yang mesti diputuskan oleh mahkamah menurut keterangan yang dikemukakan di perbicaraan. Pendapat yang dinyatakan oleh Ketua Setiausaha dengan itu tidak mengikat pesuruhjaya kehakiman yang bijaksana.

Oleh itu, sekiranya mahkamah perbicaraan mendapati bahawa defendan melafazkan kata-kata fitnah yang dikatakan dalam keupayaan peribadi, tiada persoalan tentang kekebalan boleh

berbangkit kerana baik Ketua Setiausaha mahupun Menteri tidak boleh menegaskan kekebalan bagi pihak defendan berhubung dengan kata-kata yang dilafazkannya dalam keupayaan sebagai peguambela dan peguamcara. Sekiranya mahkamah mencapai kesimpulan bahawa defendan memang telah berucap sebagai Pelapor Khas, ia mesti terus memutuskan sama ada beliau telah bertindak mengikut terma mandatnya. Dengan jelasnya, ini adalah perkara-perkara yang merupakan persoalan serius yang perlu dibicarakan (lihat ms 845D–G); *Engelke v Musmann* [1928] AC 433 dibeza.

Selanjutnya, nampaknya Ketua Setiausaha telah menegaskan kekebalan defendan dalam terma di luar skop Konvensyen Am dan Perintah 1949. Dalam suratnya, Ketua Setiausaha telah mengambil pandangan bahawa defendant melafazkan kata-kata yang diadu 'sewaktu menjalankan misi', dan dengan itu adalah kebal dari guaman. Ungkapan yang digunakan oleh Ketua Setiausaha dalam suratnya adalah lebih meluas berbanding dengan yang menonjol dalam Konvensyen Am atau Perintah 1949. Ini adalah kerana seseorang mungkin bertindak 'sewaktu menjalankan misi' dan namun begitu melakukan perbuatan yang bukan 'dalam pelaksanaan fungsi-fungsi ini'. Oleh itu, surat Ketua Setiausaha tidak muktamad (lihat ms 845H dan 846A–C).

(4) Perakuan Menteri tidak menambahkan apa-apa yang memihak kepada defendan. Perakuan itu adalah, sebagaimana yang diisytiharkan oleh s 7(2) Akta tersebut, 'keterangan fakta-fakta yang disahkan'. Menteri tidak mengesahkan *sebagai fakta* bahawa defendan telah melafazkan kata-kata yang diadu dalam keupayaan beliau sebagai Pelapor Khas. Fakta itu masih belum ditentukan dan dengan itu perlu diputuskan oleh hakim di perbicaraan. Perakuan Menteri cuma menyatakan semula takat kekebalan defendan dalam terma am. Ia tidak menyimpulkan perkara itu setakat mana yang dihujahkan oleh defendan (lihat ms 844A–C).

(5) Terma mandat defendan haruslah ditafsirkan dengan merujuk kepada perkara 12 Perintah 1949 dan bukannya s 22 perkara VI Konvensyen Am kerana perkara 12 adalah jelas dalam peruntukan yang dibuat atas termanya, dan justeru itu tiada keperluan untuk menggunakan s 22. Persoalan tentang kebebasan defendan dalam pelaksanaan fungsi-fungsinya sebagai Pelapor Khas adalah suatu perkara yang mestilah diputuskan secara *ex necessitate rei* dengan merujuk kepada terma mandat beliau. Oleh sebab itu, persoalan sama ada defendan telah melampaui mandat dalam konteks kekebalan yang dituntutnya di bawah perkara 12 Perintah 1949, serta tafsiran perkara tersebut, adalah hal-hal untuk diputuskan oleh hakim perbicaraan. Sudah tentu mereka adalah persoalan serius untuk dibicarakan (lihat ms 8459B–D dan 850B–C).

(6) Defendan telah gagal menunjukkan bahawa pesuruhjaya kehakiman telah melakukan kesilapan yang memerlukan campur tangan kuasa rayuan. Beliau telah bertanya persoalan yang betul, mengambil kira kesemua pertimbangan relevan dan mengarah

diri dengan betul atas undang-undang yang terpakai. Yang paling utamanya, perintah yang dibuatnya tidak mengakibatkan sebarang ketidakadilan kepada defendan. Tiada terdapat keputusan atas kekebalan, kerana pesuruhjaya kehakiman telah berhati-hati dalam membiarkan isu itu terbuka untuk diputuskan di perbicaraan tindakan. Defendan adalah berhak, apabila tamatnya perbicaraan, mendapatkan keputusan yang memihak kepadanya andainya ia membuktikan tuntutan kepada kekebalan atas fakta-fakta (lihat ms 851C–D).]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 138–261.

Cases referred to

Beard v London General Omnibus Co [1900] 2 QB 530 (refd)

Corrinet v Ginns (Case No C 97–0142 FMS, 21 May 1997, unreported) (refd)

Cristina, The [1938] AC 485 (refd)

Engelke v Musmann [1928] AC 433 (distd)

Haile Selassie v Cable & Wireless Ltd [1938] Ch 839 (refd)

Hilton v Thomas Burton (Rhodes) Ltd [1961] 1 WLR 705 (refd)

Ho Kean v Kong Lai Soo [1974] 2 MLJ 63 (refd)

Juan Ysmael & Co Inc v Government of the Republic of Indonesia [1954] 3 All ER 236 (distd)

Maclaine Watson & Co Ltd v Department of Trade & Industry and related appeals [1989] 3 All ER 523 (refd)

Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136 (refd)

Scaniainventor v Commissioner of Patents (1981) 36 ALR 101 (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (folld)

United States v Melekh (1960) 190 F Supp 67 (distd)

United States of America v Dollfus Mieg et Compagnie, SA [1952] 1 All ER 572 (refd)

Legislation referred to

Convention on the Privileges and Immunities of the United Nations ss 22(b) and 23 of art VI

Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 art 12(b), Pt D

International Organizations (Privileges and Immunities) Act 1992 s 7(1)

Rules of the High Court 1980 O 12 r 7

Appeal from: Civil Suit No S3–23–68 of 1996 (High Court, Kuala Lumpur)

CV Das (*Porres P Royan, S Nantha Balan* and *Trevor George De Silva* with him) (*Shook Lin & Bok*) for the appellant. A

VK Lingam (*V Sivaparanjothi, Peter Raj, R Thayalan* and *W Satchithandham* with him) (*V Siva & Partners*) for the respondent.

Cur Adv Vult B

Gopal Sri Ram JCA (delivering the judgment of the court):

The background

This appeal raises an important point of practice and procedure in the context of the doctrine of immunity from suit. The matter arose in this way. C

There is a magazine called 'International Commercial Litigation'. Though published in the United Kingdom, it has worldwide circulation. There appeared in the November issue of this magazine an article about our justice system. It was headed 'Malaysian justice on trial'. One David Samuels authored it. The article carried references to certain cases that D had been dealt with by the courts of this country. Among these cases was one in which the plaintiffs (respondents in the appeal) were concerned. The article also reproduced, in direct quotes, words spoken by the defendant (the appellant in this appeal).

The plaintiffs took umbrage over the words published by the E defendant. They formed the view that the defendant had injured their reputation. They issued writ for defamation. The defendant took advantage of the provisions of O 12 r 7 of the Rules of the High Court 1980 ('the Rules'). He entered conditional appearance with leave of court. Then, within the time limited by that rule, he took out a summons to set aside the writ on the ground that the court had no jurisdiction over his person F because he was immune from suit. The defendant's claim for immunity rests on the ground that he was, at the material time, the United Nations Special Rapporteur on the independence of judges and lawyers. In support of his claim, he relied, among other matters, on a letter written by the Secretary General of the United Nations and a certificate issued by the G Honourable the Minister for Foreign Affairs of Malaysia ('the Minister'). These will be referred to later in this judgment.

The judicial commissioner's approach

The defendant's summons came up before the learned judicial H commissioner. After a hearing spread over several days, she reserved judgment. In a carefully considered judgment, she came to the conclusion that the defendant's immunity was a matter that was not capable of resolution in a summary manner. She therefore dismissed the summons and directed the defendant to deliver his defence. She also left it open to the defendant to raise in his statement of defence the immunity question I for determination at the trial of the action. This is how she put it (see [1997] 3 MLJ 300 at pp 315–316):

A Having regard to the matter in its entirety, it is inevitable that I need to postulate that at this interlocutory stage, it is not for me to determine whether the said words imputed to the defendant are defamatory or not. Only the question of jurisdiction looms large.

Towards that end, I must assume that all the allegations as enclosed in the statement of claim are true without deciding it to be so.

B To do this, I have to see whether the facts placed before me and the relevant laws cited to me oust the jurisdiction of this court.

It is a fact that the defendant is a Special Rapporteur with the United Nations. It is a fact that he made the statement to the magazine.

Even assuming for a moment that the statement is damning and C consequently defamatory, I would have to ascertain whether it would exclude the defendant from the jurisdiction of this court.

On the first point there is no dispute. Even on the second, the court's jurisdiction is not ousted even if *Mazilu's case* points otherwise, since the ICJ's decision is not binding on this court on a point of public international law and in any event, on the facts made available to me at this interlocutory D stage, there is no evidence to suggest that the test set out in *Mazilu's case* have been met.

Therefore hackneyed as it may sound, I must reiterate that for purposes of determining jurisdiction, I must assume the allegation in the plaintiffs' statement of claim is true and:

E 'Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts, that the plaintiff would be able to establish, relating to the subject matter of the dispute, the court would have no F power to grant relief of the kind sought against the defendant' (per Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at p 1152E–F, PC).

In the circumstances, I am unable to hold that the defendant is absolutely protected by the immunity he claims.

That does not mean however, that the defendant is estopped from G adducing further evidence at trial to support his claim. If — at the end of the trial of the plaintiffs' action, after taking all evidence from the parties — I come to the conclusion that immunity attaches to the defendant, the defendant may succeed at that stage.

All I am deciding for the moment is that on the evidence before me, I have jurisdiction to hear this action (corrected before us) ... .

H

The issues in the appeal

Before us, the decision of the judge was attacked by the defendant on several grounds. However, at the end of two days of hearing, after the dust I of conflict had settled, it became plain that the appeal really turned upon two issues. They may, we think, be conveniently summarized in the form of the following two questions:

(1) Was the judicial commissioner entitled, as a matter of law, to defer the question of the defendant's immunity? A

(2) Even if she was, ought she to have done so on the facts of this case?

The first question concerns the existence of a discretion. The second concerns the correctness of the exercise of that discretion by the learned judicial commissioner. If, as contended by the defendant, the law vests no B discretion in a High Court to postpone the determination of his immunity from suit, then the first question must be answered in his favour. However, even if the first question is resolved against the defendant, that is not an end of the matter. For, he is yet entitled to succeed if the High Court was wrong in exercising discretion to postpone its decision on the question of C the defendant's immunity until it had tried the action.

It is with these matters in mind that we now turn to consider the two issues that lie at the heart of this appeal.

The first issue: is there a discretion? D

It is the defendant's argument that the judicial commissioner was wrong in failing to determine the claim of immunity in a summary fashion upon the summons before her. He says that the law gave her no choice in the matter. It is submitted that the learned judicial commissioner erred in postponing her determination of the defendant's immunity until the trial of the action. E Her decision in this respect, the defendant argues, goes against the weight of authority.

To properly appreciate these arguments, it is necessary to examine the relevant rule of court. It is O 12 r 7. And it reads as follows:

> 7 (1) A defendant to an action may at any time before entering an F appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction. G
>
> (2) An application under this rule must be made by summons.

It was submitted on the defendant's behalf that there is no power in the High Court under r 7(1) of O 12 of the Rules to postpone the determination of the question whether the court has jurisdiction over the person of a defendant. In other words, the defendant's claim of immunity must be H answered either in his favour or against him upon his application to set aside the writ. Counsel for the defendant also submitted that that is the way in which the rule has been previously applied.

In support of these arguments, he referred us to *Juan Ysmael & Co Inc v Government of the Republic of Indonesia* [1954] 3 All ER 236. He read I the following passage in the advice of the Privy Council, delivered upon that occasion by Earl Jowitt (at p 239):

> In whichever way the rule is stated, it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign state

A is directly impleaded the writ will be set aside, but where the foreign sovereign state is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is, therefore, indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly, if the foreign government is required as a condition of obtaining B immunity to prove its title to the property in question, the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in *Dollfus Mieg* [*United States of America v Dollfus Mieg et Compagnie, SA* [1952] 1 All ER 572] where he said (at p 588):

> '... a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed C but not established, and, indeed, to require him [ie, the foreign sovereign] to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do.'

Juan Ysmael concerned the claim by the Republic of Indonesia to a vessel D based on a bill of sale purportedly made on the vendor's behalf by an agent who acted outside the scope of his authority. The appellant/vendor issued a writ in rem for possession of the vessel in question. The Republic entered a conditional appearance and applied to set aside the writ and all subsequent proceedings on the ground of sovereign immunity. It was contended on behalf of the Republic that it was being indirectly impleaded as the true E owner of the vessel. The Appeal Court of Hong Kong upheld the claim for immunity and set aside the writ. The Privy Council, on further appeal, reversed that finding and restored the writ to file. The actual decision of the Board is accurately summarized in the headnote to the case in the *All England Reports* as follows:

F Held: where a foreign sovereign state claims, in proceedings to which it is not a party, immunity from the court's jurisdiction for its alleged interests in property which is the subject of the proceedings, the bare assertion of a claim of title to the property is not enough to entitle the foreign sovereign state to that immunity; but once the court is satisfied that there are conflicting rights which have to be decided in relation to the claim of the foreign G sovereign state and that the state's claim is not for rights which are illusory, the state is entitled to immunity from the court's jurisdiction: and as, on the facts, the purported sale of the ship by the appellants' agent to the government of Indonesia was without authority, as the government's purchasing agent knew, the government had not established that, at the date when they claimed immunity (9 July 1952), they had any such interest in the ship as H would show that they were impleaded, and accordingly the court had jurisdiction.

Counsel for the defendant has argued that the present case comes within the scope of the proposition formulated by Lord Radcliffe in the *Dollfus Mieg*'s case and quoted by Earl Jowitt in *Juan Ysmael*. Here too, says I counsel, is a case where immunity is claimed but not established. To insist that the defendant's immunity be established at the trial of the action is to do the very thing which the court ought not to do.

The short answer to counsel's argument is that both *Dollfus Mieg* and *Juan Ysmael* were cases that concerned sovereign immunity which is

absolute in nature. It is trite law that a foreign sovereign may not be impleaded in the domestic forum. And the decision of the House of Lords in *Dollfus Mieg* and that of the Board in *Juan Ysmael* are merely explanatory of the expression 'impleaded' in the context of an assertion of proprietary or possessory rights. For the purpose of the doctrine of sovereign immunity, a foreign government is considered to be impleaded if property of which it is the owner or of which it is in possession or control is made the subject either: (i) of an action in rem; or (ii) of an action in personam by the judgment in which its proprietary or possessory rights might be affected (see *The Cristina* [1938] AC 485 at pp 490, 507; *United States of America v Dollfus Mieg et cie*).

However, it is to be noted from the authorities upon the subject that even a plea of sovereign immunity in relation to possessory or proprietary rights may not always lie beyond curial investigation (see, for example, *Haile Selassie v Cable & Wireless Ltd* [1938] Ch 839, in particular the judgment of Sir Wilfrid Greene MR). The test is whether the property which is claimed is proved or admitted to belong to the foreign sovereign or is lawfully in his possession. Thus, in *Juan Ysmael*, the Privy Council subjected the evidence led on both sides to critical examination and came to the conclusion that the title claimed by the Republic of Indonesia to the vessel in question was, to use the words of Earl Jowitt, 'manifestly defective' (see p 242 of the report). The quality of evidence available on record before the Board in that case made possible such a finding. However, it is difficult to envisage what may have happened if the evidence required further investigation.

It is therefore not surprising to find that in *Dollfus Mieg*, Lord Radcliffe was extremely careful in his choice of words when he laid down the governing principle. When he used the phrase 'normally to be granted or refused' while referring to an application to stay proceedings under O 12 r 7, he undoubtedly had it in mind that cases may occur which, by the very nature of their peculiar facts, would not be 'normal' and would therefore fall to be decided differently.

The present appeal falls well outside the scope of the doctrine of sovereign immunity. The defendant is not a foreign sovereign. The immunity he claims, as conceded by his counsel, is not absolute. It is circumscribed by the terms of the mandate conferred upon him. That mandate is to be found in the defendant's own report (at p 312 of Vol 2 of the appeal record). This is what it says:

> At its fiftieth session, in resolution 1994/41 of 4 March 1994, the Commission on Human Rights, noting both the increasing frequency of attacks on judges, lawyers and court officials and the link which existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a Special Rapporteur whose mandate would consist of the following tasks: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in

protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

If O 12 r 7 of the Rules receives the interpretation canvassed by the defendant, it would mean that in no case would the court be in a position to say whether a Special Rapporteur had acted within the scope of his mission. It would place the rule in a strait-jacket and afford no flexibility whatsoever to its application. However abnormal a case may be, the High Court must, if counsel is correct in his submissions, resolve an immunity question summarily.

We are here dealing with a rule of court; not a statute enacted by Parliament. Rules of court are formulated to assist in the attainment of justice; not its obstruction. Hence, it is a settled principle that a rule of court must receive a construction that would not result in unfairness or produce a manifest injustice. See *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 at p 296.

An acceptance of the approach suggested by counsel would produce an unjust result. It would prohibit the court from dealing with each case according to its peculiar facts when dealing with an application under O 12 r 7 of the Rules. Justice will not be achieved by a rigid and unbending approach to the terms of that rule of court.

We must therefore dissent with the propositions advanced by counsel. In our judgment, the learned judicial commissioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the defendant's immunity until after she had had the benefit of viva voce evidence upon that issue. Whether she was correct in doing so in the present instance goes to exercise of discretion. It falls within the scope of the second question to which we now turn.

The second issue: was discretion correctly exercised?

The alternate submission made in support of the appeal by Dr Das, of counsel for the defendant, is that even if O 12 r 7 permits a postponement of the immunity issue, the judicial commissioner was wrong in doing so in the present case. This argument, as we observed a moment ago, goes to the exercise of discretion by the judicial commissioner.

Dr Das argues that there was evidence before the judicial commissioner, which established conclusively the defendant's immunity. Counsel submits that there is no serious question to be tried on the issue of the defendant's immunity because there is no credible denial of the defendant's assertion that he spoke and published the alleged defamatory words while on mission as Special Rapporteur. It is also submitted that it is for the Secretary General to waive the immunity that attached to the defendant's office. Since that high official asserted immunity and the

Minister had issued his certificate, there was no doubt that the plaintiffs could not implead the defendant. It is for the Secretary General to decide whether the defendant had exceeded the terms of the mandate given him. In any event, the defendant had not exceeded the terms of his mandate. A

Dato' Lingam's response is that in the circumstances of the present case, no concluded view upon the question of the defendant's immunity is possible at this stage of the proceedings. Counsel submits that the very article in which the defendant is described as Special Rapporteur has been impugned as untrue. The defendant wears many hats. Apart from being a Special Rapporteur, he is also an advocate and solicitor with a private commercial interest. It is submitted that neither the letter from the Secretary General nor the Minister's certificate are conclusive of the defendant's immunity, which is a matter the High Court must determine after a trial upon all issues. Dato' Lingam has also submitted that the defendant's claim that he spoke the words while on mission is under challenge by the plaintiffs. He argues that there are serious questions to be tried. B C

As to the test that is to be applied in determining whether a postponement is proper in any given case under O 12 r 7, counsel on both sides stand upon common ground. They submit that the correct approach is to determine whether there are any serious questions that call for a trial. We agree. D

An application to set aside a writ or to stay proceedings must, as correctly submitted by Dr Das, be tested in the same way as an application to strike out a writ or other pleading under O 18 r 19 of the Rules. Where the facts upon which challenge to jurisdiction is made are themselves in dispute, then, those facts must be established in the usual way. If the affidavit evidence in an *interlocutory* matter is of such a quality that renders a trial unnecessary, a court may proceed to make findings based upon that evidence. But, in an *interlocutory* application, where the court feels it unsafe to make any definite findings, it is perfectly entitled to say so and order the matter to be determined at trial. It may be added for completeness that where jurisdiction is challenged, the facts as pleaded in the statement of claim must be assumed to be true. See *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136. E F G

The extent of the disagreement between the disputants before us is focussed upon a single question. It is whether there are serious issues to be tried. If Dr Das is correct in the primary submission that he makes, namely, that there are no serious questions warranting a trial, it follows that the learned judicial commissioner erred in postponing her decision on the defendant's immunity. H

For the purpose of addressing the question at hand, it is necessary, as a first step to identify some of the salient issues that form the axis of the dispute between the parties. For the purposes of the present appeal, three are readily identifiable. They are as follows: I

(1) Whether the defendant spoke and published the words complained of while on mission, that is to say, in his capacity as Special Rapporteur;

(2) Whether it is the court or the Secretary General who should determine whether the defendant exceeded the terms of his mandate when he spoke and published the alleged defamatory words; and

(3) If it is the court and not the Secretary General who should make the determination, then, whether the defendant did in fact exceed the terms of his mandate.

Although each of these questions flows from one to the next, it is preferable to deal with them separately.

The capacity in which the defendant spoke

Dr Das argues that the question of capacity is capable of summary determination, and, because the evidence in relation to it has not been credibly denied, it ought to be resolved in the defendant's favour. Accordingly, submits counsel, the judicial commissioner erred in reserving this issue to trial.

The primary evidence relied on by the defendant in support of this submission is the impugned article itself. Counsel read two passages, which he said, concluded the point in the defendant's favour. The first passage in the article in question is as follows:

> Param Cumaraswamy who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that he has received enquiries about Malaysia from foreign businessmen. Originally a counsel at the Malaysian firm of Shook Lin & Bok, he says: 'It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending'.

The second passage reads as follows:

> Cumaraswamy thinks Malaysia would not be able to repeat that result at present. 'Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice,' he says. 'But I do not want any of the people involved to think I have yet made up my mind.'
>
> Cumaraswamy says that although these complaints 'only came to prominence because of the judge-choosing allegations in the *Ayer Molek* affair, people first started to question the integrity of the judiciary after the RM10m ($4m) libel award which Vincent Tan received on October 22 last year.

Dr Das argues that these passages make it clear that the defendant spoke and published the alleged defamatory words in his capacity as Special Rapporteur. Dato' Lingam, however, pointed out that the article contains a material error. It describes the defendant as 'originally a counsel at the Malaysian Firm of Shook Lin & Bok'.

Counsel for the plaintiffs says that this is plainly wrong. He has pointed out that the defendant was in truth and fact, at the date of the article, the chief executive partner of the said firm of solicitors. It was further argued that the truth of the whole of the impugned article was

under challenge, including the allegation by the author that the defendant was interviewed and spoke in his capacity of Special Rapporteur. The plaintiffs also argue that the defendant wore several hats and that he made the alleged defamatory statements in his capacity as an advocate and solicitor and not as Special Rapporteur. That is why, Dato' Lingam says, the defendant was sued in such capacity. Counsel submits that the plaintiffs should not be shut out at this stage of the proceedings from redeeming their reputation by having such a hotly contested point determined in a summary fashion.

These rival contentions amount, in our judgment, to a serious question. We are of the view that it would be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words.

Suffice to say that the article in itself does not expressly declare that the defendant was interviewed and spoke the alleged defamatory words as Special Rapporteur. What his counsel has done is to invite this court to infer, from the tenor of the language employed by the author of the article, that the defendant spoke solely as Special Rapporteur.

With respect, we must decline this invitation. The issue under discussion is substantially an issue of fact. Like any other fact, it must be determined at trial, after hearing all the evidence led upon it and after a mature consideration of the submissions to be made on both sides.

So far as the affidavit evidence is concerned, we have carefully considered these and have come to the conclusion that they do raise a serious dispute as to the capacity in which the defendant was alleged to have spoken and published the words complained of. In the circumstances of the present case, and in fairness to both sides, it would have been most unwise of the judicial commissioner to embark upon a summary resolution of the point at issue. In our judgment, she was entirely correct in reserving her decision until after the trial of the action.

Who decides excess of mandate?

Dr Das has argued that it is for the Secretary General of the United Nations to decide whether the defendant exceeded the mandate granted him. If the Secretary General took the view that the defendant had exceeded the terms of his mandate, the former would have waived the latter's immunity. This did not happen. Counsel points out that, instead of a waiver of immunity, there has been an assertion of it. In support, he referred to the letter from the Secretary General. We spoke of it earlier in this judgment. It is in the following terms:

> To Whom It May Concern
>
> In connection with Civil Suit No S3–23–68–1996 by MBf Capital Bhd and MBf Northern Securities Sdn Bhd against Dato' Param Cumaraswamy, the Secretary General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and

Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Param Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under arts VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 26 October 1957 without any reservation.

In accordance with s 22 of art VI of the Convention, 'experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ... .' Section 22(b) of the Convention further provides that, 'they shall be accorded, in respect of words spoken or written and acts done by them in the course of performance of their mission, immunity from legal process of every kind'. As such, the Special Rapporteur on the Independence of Judges and Lawyers is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of performance of his mission.

The Secretary General has determined that the words which constitute the basis of the plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto. Under s 34 of the Convention, the Government of Malaysia has a legal obligation to 'be in a position under its own law to give effect to the terms of this Convention'. The Secretary General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

The letter from the Secretary General is dated 7 March 1997. Five days later, that is to say, on 12 March 1997, the Minister issued his certificate under s 7(1) of the International Organizations (Privileges and Immunities) Act 1992 ('the Act'). That certificate is in the following terms:

> I, Dato' Abdullah bin Hj Ahmad Badawi, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under s 7(1) of the International Organizations (Privileges and Immunities) Act 1992 hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:
>
> (a) to inquire into any substantial allegations transmitted to him and report his conclusions;
>
> (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;
>
> (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.
>
> Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949, Dato' Param Cumaraswamy

shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Relying upon these two documents, Dr Das submitted that the defendant's immunity from suit for the words spoken was beyond argument. He drew our attention to the relevant provisions in the Convention on the Privileges and Immunities of the United Nations ('the General Convention'), the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order') and the Act. They are as follows.

First, ss 22(b) and 23 of art VI of the General Convention which are in the following terms:

22 Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:

(a) ...

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

23 Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Next, art 12(b) which appears under Pt D of the 1949 Order headed 'Persons employed on missions on behalf of the United Nations'. It provides thus:

12 Except in so far as in any particular case any privilege or immunity is waived by the Secretary General of the United Nations, persons employed on missions on behalf of the United Nations shall enjoy —

(a) while exercising their functions as such, as during their journey to and from the place of meeting, immunity from personal arrest or detention and from seizure of their personal baggage and inviolability for all papers and documents;

(b) immunity from legal process of every kind in respect of words spoken or written and all acts done by them in the exercise of these functions.

Lastly, s 7(1) of the Act which makes the following provision:

7 (1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

A (2) In any proceedings, a certificate given under this section is evidence of the facts certified.

Dr Das cited a number of authorities in support of his arguments on this point. Arguing against the proposition advanced by the defendant, Dato' Lingam too referred us to several authorities. While we fully appreciate the B industry of counsel on both sides, for which we are very grateful, we find a discussion of the all the cases and works of authors learned on the subject cited to us by counsel to be unnecessary to arrive at our conclusion.

With respect, we are unable to agree with Dr Das' submission that the defendant's immunity from suit is a matter beyond a peradventure C because the Secretary General has already expressed his view that the words complained of were uttered by the defendant (to quote from his letter) 'in the course of his mission'. We are also unable to agree with his argument that the Minister's certificate, which is evidence of the facts therein stated, concludes the matter in the defendant's favour. Our reasons are as follows.

D First, so far as the Secretary General's letter is concerned, neither the General Convention nor the 1949 Order, nor indeed the Act, confers any power or authority upon him to declare that the words complained of were spoken by the defendant in his capacity as Special Rapporteur.

Indeed, counsel for the defendant has plainly failed to demonstrate E that the Federation of Malaysia has, by treaty or legislation, surrendered its sovereign judicial power to any organ of the United Nations to make a finding of fact of the nature that forms the core of the litigation in the instant case. It is axiomatic that the judicial power of the Federation of Malaysia, which is vested in its courts, is not to be lightly treated as having F been excluded by treaty or even by municipal legislation.

The power vested in the judicial arm of government to review executive acts and to decide disputes inter se citizens and between citizens and the state is jealously guarded. Clear words in a statute are essential to exclude that power. Needless to say, such clarity of language is absent in the General Convention, the 1949 Order and the Act.

G Accordingly, we are satisfied that the General Convention and the 1949 Order merely confirm the Secretary General's power to waive immunity. With respect to counsel for the defendant, there is absent any power in the Secretary General to make the kind of determination of fact he has made in his letter, namely, that the defendant spoke and published H the words complained of in his capacity as Special Rapporteur. That is a question for our courts to decide. And the stage for making such a determination has not as yet arrived. The suggestion that the Secretary General may by the stroke of his pen exclude the power of the High Court to make the factual determination upon which the defendant's immunity is postulated is, with respect, an invitation to journey from the sublime to I the ridiculous, which we must with respect, decline to accept. In our judgment, the learned judicial commissioner was plainly correct in refusing to act upon the mere ipse dixit of the Secretary General on the question of the capacity in which the defendant spoke the words complained of.

Second, in so far as the Minister's certificate is concerned, it adds nothing in the defendant's favour. That certificate is, as the second subsection to s 7 declares, 'evidence of the facts certified'. Dr Das says that phrase means 'conclusive evidence'. Dato' Lingam disagrees. He submits that 'evidence' is miles apart from 'conclusive evidence'.

We do not feel compelled to resolve the conflict at this stage. Suffice to say that even if Dr Das is correct in his submission; and we are not for a moment to be taken as saying that he is; the Minister has not certified *as a fact* that the defendant spoke the words complained of in his capacity as Special Rapporteur. That fact is therefore still at large and must necessarily be determined by the judge at trial. All that the Minister's certificate does is to reproduce the extent of the defendant's immunity in general terms. In our judgment, the certificate does not conclude the matter to the extent contended by the defendant.

The reliance placed by defendant's counsel on the decision in *Engelke v Musmann* [1928] AC 433 in this connection is, with respect, not well founded. That case concerned an action for arrears of rent. The defendant, Engelke, applied to set aside the writ. He filed two affidavits in support of his application. The plaintiff, Musmann, applied for an order to have Engelke cross-examined on those affidavits. The judge in chambers ordered cross-examination. Engelke appealed. Before the Court of Appeal, the Attorney General appeared at the request of the Foreign Office and, on being invited, made a statement to the effect that Engelke had been appointed as the Consular Secretary to the German Ambassador and had been received in that capacity by the government of Great Britain. The Court of Appeal by a majority (Lord Hanworth dissenting) declined to accept the Attorney General's statement. It dismissed the appeal. On further appeal, the House of Lords formed the view that the Attorney General's statement on the defendant's status should be accepted as conclusive. The House accordingly held that the defendant was immune from process by reason of the provisions of the Diplomatic Privileges Act 1708. It was in this context that Lord Buckmaster made the observations now relied upon by Dr Das in support of the instant defendant's appeal.

The following passage from Lord Buckmaster's speech was read to us by counsel in support of the argument that the defendant's claim to immunity from process was, in the public interest, a necessary restraint upon the judicial power of the courts of this country (at pp 446–447):

> It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the courts the people with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter we are called upon to decide; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to people as holding such posts on the ambassadorial staff as entitled them to the privilege and

A the statement as to their position had been afforded on behalf of the Crown through the Attorney General, it was to be disregarded by the judiciary, for, in such circumstances, the ensuing contest could not possibly inure to the public good.

The present case does not concern diplomatic immunity. The views B expressed by Lord Buckmaster in the passage above-quoted, therefore, do not, in our judgment assist the defendant. We do, of course, take full cognizance of the Minister's certificate and give it all the weight Parliament says it shall have. But the certificate, beyond stating as a fact that the defendant is a Special Rapporteur, does not go further to certify that the words complained of were spoken by the defendant in that capacity. The C Minister has therefore, very properly, left open that fact to be determined by the court.

It is clear that the capacity in which the defendant spoke the impugned words is intertwined with his mandate. The former is, as we have earlier said, a matter for the courts to decide. It follows that the latter must also D be resolved in like fashion.

In our judgment, the question whether the defendant exceeded the terms of his mandate is not a matter for the Secretary General to decide. It is a question that the court must determine according to the evidence presented at the trial. The opinion expressed by the Secretary General did E not therefore bind the learned judicial commissioner. She disregarded it. She was entitled to do so. Her decision in this respect is correct.

To reiterate, the question whether the defendant uttered the alleged defamatory words in his private capacity or as Special Rapporteur is one of fact to be determined at the trial of the action. If the trial court finds that the defendant spoke the alleged defamatory words in his personal capacity, F no question of immunity can arise. For, neither the Secretary General nor the Minister may assert immunity on behalf of the defendant in respect of words uttered by him in his capacity as advocate and solicitor. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms G of his mandate. Clearly, these are matters that amount to serious questions calling for a trial of the action.

However, before we move further, there is one other comment that we wish to make about the Secretary General's letter. It appears that the Secretary General has asserted the defendant's immunity in terms that H clearly fall outside the scope of the General Convention and the 1949 Order.

Section 22 of art VI of the General Convention confers upon experts on mission immunity for acts done and words written or spoken 'in the course of the performance of their mission'. Article 12(b) of the 1949 Order, on the other hand, confers immunity upon persons employed on I missions on behalf of the United Nations, 'in the exercise of these functions'. These words mean, of course, that persons, such as the defendant, are immune from suit or prosecution so long as their acts were done, or their words were spoken or written, in the exercise of their functions.

However, the Secretary General has, in his letter, taken the position that the defendant uttered the words complained of 'in the course of his mission', and is therefore immune from suit. We are however of the view that the phrase employed by the Secretary General in his letter is of much wider import than that appearing in either the General Convention or the 1949 Order. For, a person may be 'in the course of his mission' and yet commit acts that are not 'in the exercise of these functions'. The point comes into sharp focus in cases where it is shown that a defendant wears, so to speak, more than one hat. That appears to be the case here. The same would apply with equal force where a trial court finds that acts were done or statements made in circumstances that prima facie fall outside the terms of a Rapporteur's written mandate.

We therefore agree with the submission of Dato' Lingam that the Secretary General's letter is not conclusive and that it appears to create a new class of immunity not contemplated by, and falling outside the scope of, the General Convention and the 1949 Order.

With that we turn to the third question.

Did the defendant exceed his mandate?

Dr Das argues that his client did not exceed the mandate given him. It is his submission that the mandate should be construed liberally and not strictly. If a strict construction is placed upon the terms of the mandate, it may unduly curb or impede the independence of the defendant as Special Rapporteur in the performance of his work. It is contended that the defendant, as Special Rapporteur, must not only interview people but also permit himself to be interviewed by journalists. Counsel accordingly submits that although the words were spoken by the defendant during an interview conducted by a journalist, the occasion nevertheless comes within the terms of the defendant's mandate.

Dato' Lingam submits that at this stage of the proceedings, the plaintiffs have prima facie demonstrated that the defendant exceeded the terms of his mandate when he spoke the words complained of. He argues that whether the defendant acted within the terms of his mandate is a serious question that must be determined at the trial of the action.

After careful consideration, we find ourselves in agreement with Dato' Lingam's submissions. Our reasons for accepting them in preference to those advanced by Dr Das are as follows.

First, the construction of the mandate.

In support of his argument for a wide construction of the mandate, counsel relies on the opening paragraph of s 22 of art VI of the General Convention which confers immunities upon experts on missions 'as are necessary for the independent exercise of their functions'. He submits that Malaysia, as a party to the General Convention, without reservation, was obliged to and did take steps to incorporate the General Convention into its municipal law by making the 1949 Order. It is Dr Das' submission that art 12 of the 1949 Order should be interpreted to bring it in line with s 22

of art VI. According to him, this is because the former intends to give statutory effect to the latter.

In support of this contention, counsel referred us to the decision of the House of Lords in *Maclaine Watson & Co Ltd v Department of Trade & Industry and related appeals* [1989] 3 All ER 523. Since it is a case also relied on by Dato' Lingam, we consider it desirable to quote at some length from the speech of Lord Oliver of Aylmerton. This is what the learned Law Lord said (at pp 544–545):

> There is, as indeed there can be, little contest between the parties as to the general principles on which that which has been referred to as the doctrine of non-justiciability rests, though they approach it in rather different ways. The contest lies not so much as to the principle as to the area of its operation.
>
> It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v Sprigg* [1899] AC 572 at p 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22 at p 75:
>
> > 'The transactions of independent States between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make.'
>
> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the royal prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v A-G* [1971] 1 All ER 1380. The Sovereign acts:
>
> > 'throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts.'
>
> (See *Rustomjee v R* (1876) 2 QBD 69 at p 74, per Lord Coleridge CJ.)
>
> That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. *Fothergill v Monarch Airlines Ltd* [1981] 2 All ER 696, [1981] AC 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called on to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, *Philippson v Imperial Airways Ltd* [1939] 1 All ER 761; [1939] AC 332.

Further cases in which the court may not only be empowered but required to adjudicate on the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in *Zoernsch v Waldock* [1964] 2 All ER 256, or the very rare case in which the exercise of the royal prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in *Post Office v Estuary Radio Ltd* [1967] 3 All ER 679; [1968] 2 QB 740.

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.

In so far as is relevant to the case at hand, the principle that emerges from the foregoing passage is that reference to a treaty, such as the General Convention, for the purpose of interpreting a municipal statute, such as the 1949 Order, that seeks to give effect to the former is permissible only where the latter is ambiguous. But the proposition has no relevance whatsoever to a case where the provisions of the municipal statute that seeks to give effect to a treaty are plain and unambiguous. That much is made clear by the decision of the Federal Court of Australia (General Division) in *Scaniainventor v Commissioner of Patents* (1981) 36 ALR 101 (a case referred by us to counsel during argument). There, Fox, Franki and Northrop JJ when delivering the joint judgment of the court made the following observation (at p 106) with which we express our agreement:

> Moreover, it is open to the municipal law of a country to enact provisions which give effect to those of the treaty in its own way. If the municipal law does not accord with the treaty (and this can only be decided by an

application of ordinary principles), the provisions of the municipal law prevail. The construction of the treaty itself will be decided, as between nations, according to rules wider than those by which we construe our own legislation.

Article 12 of the 1949 Order is clear and unambiguous in the provision it has made by its terms. There is therefore no necessity to have resort to s 22 of art VI of the General Convention for purposes of interpreting the municipal legislation in this case. As was pointed out to counsel during argument, art 12 of the 1949 Order is, by its terms, narrower than s 22. Our courts are therefore unconcerned with the language of s 22 of art VI. They must, instead, confine themselves to the language actually used by art 12 of the 1949 Order.

It follows therefore that the terms of the defendant's mandate has, at this stage, to be construed with reference to art 12 and not s 22 of art VI of the General Convention. As earlier observed, art 12 renders the defendant immune only if he spoke and published the words complained of in the exercise of his functions as a Special Rapporteur. This involves the two elements. The first is the capacity in which the words were spoken. That, as we earlier said, is a question which falls to be resolved at the trial. The second element is the defendant's mandate, the question being whether he exceeded it on the facts peculiar to this case.

As a general rule, where a tortious act is committed in excess of authority, it may be inferred, in the absence of other facts, that the tortfeasor was on a frolic of his own and was therefore acting in his personal capacity. The cases of *Beard v London General Omnibus Co* [1900] 2 QB 530 and *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 WLR 705 are illustrative of this proposition and go to demonstrate that, in the law of torts, the question whether an act was performed within the scope of a tortfeasor's authority is one of fact and of degree.

In the present instance, the defendant's mandate, which we have reproduced in full earlier in this judgment, is, in summary, confined to:

(a) the making of inquiries into any substantial allegations transmitted to him and to report his conclusions thereon;

(b) identifying and recording attacks on the independence of the judiciary, lawyers and court officials;

(c) making concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and

(d) studying important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

In short, the scope of the defendant's function is to inquire and report to the Commission on Human Rights upon matters that concern the independence of judges and lawyers. Nowhere by its terms does the mandate authorize interviews to members of the press. Thus, in our view,

upon the very limited material available at this early stage of the proceedings, it is not entirely beyond dispute whether the words complained of were published by the defendant in the exercise of his functions as Special Rapporteur.

It follows from our interpretation of art 12 that the question of the independence of the defendant in the exercise of his functions as Special Rapporteur is a matter that must *ex necessitate rei* be determined with reference to the terms of his mandate. Accordingly, the question whether the defendant exceeded his mandate in the context of the immunity claimed by him under art 12 of the 1949 Order, as well as the construction of that Article, are matters for the trial judge to decide. Indeed, they are serious questions to be tried.

Dr Das' argument that the defendant's mandate includes not only a right to interview, but also to be interviewed, is one that must await pronouncement on its merits until the trial of the action. It is not an argument upon which we should give any concluded view at this stage of the proceedings.

In our judgment, each case must be decided according to its own facts. There may be circumstances in which statements made by a Special Rapporteur during an interview come well within the scope of his mandate. On the other hand, a fact pattern may emerge that leads to the conclusion that what was said or done at such an interview was in excess of the authority given to a Special Rapporteur.

There is no harm in anybody agreeing to an interview by members of the print or electronic media. Whether he is prepared to submit himself to such an interview, the matters that he chooses to speak upon and the words he uses are, of course, entirely within his discretion. But, where, in the course of an interview, disparaging remarks are made of a plaintiff and there is an attack on reputation, it must be determined according to the facts of each case whether the immunity claimed applies to the occasion upon which the words were uttered.

So too here. It is a matter for the trial judge to determine on the totality of the evidence to be led at the trial whether the defendant was acting within the terms of his mandate when he gave the interview and spoke the alleged defamatory words.

Exercise of discretion: an overview

To summarize, the three issues earlier identified by counsel during argument are serious questions to be tried. They were manifestly unsuitable to be resolved in a summary fashion having regard to the peculiar facts of this case.

Earlier in this judgment, we observed that the defendant's second and alternative submission that the judicial commissioner erred in postponing the determination of the defendant's immunity went to the exercise of discretion. The principles that govern appeals against the exercise of discretion are well settled and beyond argument.

A The initial function of an appellate court in such cases is one of review only. An appellate court has no original discretion to exercise until and unless an appellant demonstrates that the judge at first instance took into account irrelevant considerations, or failed to take into account relevant considerations, or asked himself or herself the wrong question, or erred in point of principle or that the order made would result in injustice. Looking B at the matter as a whole, on a broad overview, we are satisfied that the present appeal does not fall within any of these categories.

In our judgment, the defendant has failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into C account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the defendant. There has been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim D to immunity on the facts.

The approach

Dr Das reminds us that we must ensure that we ought not to, by our decision, set a dangerous precedent by adopting a robust approach to the E question of the defendant's immunity. With respect, we need no reminder of our duty of which we are most conscious. But it must be borne in mind, by all concerned, that an assertion of immunity is not to be likened to the rubbing of the lamp by Aladdin. There is no magic in it. Any belief entertained to the contrary must be abandoned soonest.

F Each case where immunity is asserted has to be dealt with on its own facts. Whether a particular fact pattern attracts immunity is for the courts to decide in the exercise of their constitutional function. If a court holds that immunity does not attach to an individual in a given set of circumstances, that is an end of the matter. The governing principles are G well settled. But their application varies according to the peculiar circumstances of each case. The present appeal is merely one such instance.

We note with satisfaction that courts of other jurisdictions have adopted a similar approach. Thus, in *United States v Melekh* (1960) 190 F Supp 67, the Federal District Court (Southern District of New York) H denied immunity to an official of the United Nations despite a letter of verification. Similarly, the Court of Appeal of Paris, in 1961, in the case of *Ali Ali Reza c consorts Grimpei* denied the Saudi Arabian delegate's claim of immunity on the ground that the immunity conferred upon members who attended the Third Session of the General Assembly (held in Paris in 1948) by the equipollent French decree was limited to acts and words I spoken and written in the exercise of their functions and had no application to a private contract made prior to the session and continued after its close. These and other examples are to be found in *The Digest of International Law* Vol 43 at p 32 et seq.

The issue of immunity has been considered very recently by the United States District Court for the Northern District of California in *Corrinet v Ginns* (Case No C 97–0142 FMS, decided on 21 May 1997, unreported). The defendant, Ginns, was an official employed by the United Nations. The plaintiff, Corrinet, had commenced an earlier action against the United Nations, its then Secretary General, Boutros Boutros-Ghali and other persons, including the defendant, Ginns, claiming damages for defamation in respect of certain statements that Ginns had made concerning the genuineness of a document in the plaintiff's possession. Weigel J dismissed the first action on the ground that the defendants enjoyed immunity for words spoken or written in their official capacity. However, the court gave the plaintiff leave, if he so wished, to sue Ginns, in the latter's personal capacity. Pursuant to this order, the plaintiff commenced the second action against the defendant Ginns. The court struck out the second action on the ground that the plaintiff's pleading did not adequately raise a cause of action against the defendant in his personal capacity. It held that on the facts pleaded by the plaintiff, the defamatory remarks had been made by Ginns in his official capacity for which he was immune from suit by reason of s 7(b) of the International Organizations Immunities Act (22 USC s 288d(b)) which provides that officers and employees of the United Nations are 'immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as officers, or employees except insofar as such immunity may be waived' by the United Nations.

Fern M Smith J, when delivering judgment, said:

> The plaintiff argues that this action should not be dismissed on the ground of immunity because the plaintiff has pled causes of action against defendant in his individual capacity. The plaintiff alleges that the defendant acted out of personal animosity towards the defendant and in direct contradiction to the written direction of his employer (complaint P 30). Although the plaintiff recognizes that the issue to be determined is whether the complaint pleads facts showing conduct outside of the defendant's official capacity, (memorandum of points and authorities in support of opposition to motion to dismiss ('Pl's Opp'n') at 7), the plaintiff's complaint in this action is virtually unchanged from the complaint filed in *Corrinet v United Nations*, which was dismissed on the ground that the plaintiff had not pled facts showing individual capacity conduct. The new complaint contains two relevant changes. First, plaintiff alleges that Ginns is sued solely in his individual capacity (complaint P 4); the similar paragraph in the old complaint alleged that defendant was at all times working within the scope and course of his status as an official of the UN (*Corrinet v United Nations Complaint*, Schmidtberger Decl Ex C P 16). Second, the new complaint alleges that 'when Ginns conducted himself in the above-stated defamatory matter [sic], he did so out of personal animosity toward Corrinet, and in direct contradiction to the written direction of his employer, the United Nations. As such, Ginns' conduct as alleged herein is outside the scope and course of that employment, and is conduct which Ginns is personally and individually liable for (complaint P 30.)
>
> These minor alterations do not change the fact that the plaintiff only alleges action undertaken while the defendant was acting as a UN official.

A See complaint P 22(A) (alleging that Associated Press reporter to whom the defendant made allegedly defamatory statements was referred to the defendant by the UN); complaint P 25 (alleging that the defendant spoke to Associated Press reporter 'in his position as the United Nations designee to give a reference concerning Mr Corrinet'). The plaintiff admits that the new complaint is 'quite literally a word processor result of the first action, with B deletions of party defendant and claims made against other defendants in the previous action. ... As to Ginns, the claims have stayed exactly the same.' (P1's Opp'n at 12.) But plaintiff nonetheless argues that because of an alleged long-standing feud between the plaintiff and the defendant, the defendant's actions were motivated by personal animosity toward plaintiff and were therefore undertaken in his individual capacity. The plaintiff's C argument is unavailing.

Assertions of bad faith or other improper motive have 'no bearing' on the court's determination of whether the defendant is immune under the UN Convention and the IOIA. See *De Luca v United Nations Organization* 841 F Supp 531 at p 535 (SDNY), affirmed, 41 F 3d 1502 (2d Cir 1994). In *Donald v Orfila*, 252 US App DC 134, 788 F2d 36 (DC Cir 1986), the D court explained that when the generative action in the case was related to the defendant's official function, the plaintiff's assertions of bad motive did not convert that action into one undertaken in an individual capacity. See ibid at 37. Here, the plaintiff's complaint does no more than conclusorily allege that the defendant acted in his individual capacity, based on the plaintiff's belief that the defendant acted out of ill will towards the plaintiff. E There is nothing in the plaintiff's complaint or opposition brief that suggests that the defendant took actions outside of his official capacity. That such official actions may have been motivated by animosity toward defendant [sic]is legally irrelevant.

It is implicit from this passage that the Federal District Court was prepared F to permit the action to proceed had the facts disclosed a claim against the defendant in his personal capacity. That approach is no different than the one which commends itself to us; save that in the present case the facts are in serious dispute and require further investigation at trial.

The new point

G

There is one other matter we find it necessary to allude to. We have dealt with this appeal on the basis that the 1949 Order is the applicable written law on the subject of the defendant's immunity. However, when responding to the appeal, Dato' Lingam sought to argue that the 1949 Order is not extant and that there is no written law on the subject of the immunities and H privileges of experts who are on mission on behalf of the United Nations. This is an argument not taken in the court below. No notice of it was given to Dr Das. We formed the view that the conditions on which a respondent may seek to support the decision appealed against on grounds other than those set out in the written judgment of the judge at first instance had not been met. See *Ho Kean v Kong Lai Soo* [1974] 2 MLJ 63. Accordingly, we I did not invite Dr Das to respond to this argument. For the same reason, we decline to address it here. However, Dato' Lingam will no doubt be entitled to agitate the point at the trial of the action provided that it is properly taken in the pleadings.

The result

For the reasons we have set out in this judgment, we are of the view that this appeal must fail. The orders made by the High Court are affirmed. In so far as costs are concerned, we agree with Dr Das that the order made by the judicial commissioner directing that costs be paid forthwith is an unusual order to make on the facts of this case. The order as to costs made by the High Court is therefore set aside. Those costs shall be in the cause. However, the costs of this appeal shall be taxed and be paid by the defendant to the plaintiffs. The deposit lodged in court by the defendant is hereby ordered to be paid out to the plaintiffs to account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar